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Law Lags Behind: FOIA and Affirmative Disclosure of Information

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LAW LAGS BEHIND: FOIA AND AFFIRMATIVE DISCLOSURE OF INFORMATION

*Michael Herz**

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I. INTRODUCTION

"Freedom of information" has two connotations. One—older, more obvious for this forum, and dominant in legal circles—involves access to information about and/or in the possession of the government, as in, of course, the Freedom of Information Act ("FOIA"). The other meaning is not limited to government records and is a slogan of the information age. It is almost a pun; the term refers not just to an individual right *to* information, it comes close to asserting a liberty interest enjoyed *by* the information itself. This idea blends into "the unofficial motto of the free content movement:"¹ "information wants to be free," which plays upon—or has come to play upon—the multiple meanings of "free." In 2003, The World Summit on the Information Society adopted a Declaration of Principles that incorporates these ideas:

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¹ See Wikipedia, *Information Wants to be Free*, http://en.wikipedia.org/wiki/Information_wants_to_be_free (last visited Jan. 23, 2009). The phrase "information wants to be free" is generally credited to Stewart Brand, who explicitly meant "free" as opposed to "expensive." *Id.*

We reaffirm, as an essential foundation of the Information Society . . . that everyone has the right to freedom of opinion and expression; that this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.²

The Freedom of Information Act rests on and advances the first meaning of "freedom of information." FOIA's central justifications have to do with informing the public about what the government is up to.³ The paradigmatic sorts of records obtainable have to do with activities *of the agency*, not information about the world. And the information does not flow freely; it has to be pulled, or extracted, from the agency through a request.

But the more far-flung and vaguely utopian understanding of "freedom of information" is not irrelevant to the government and government information. The information age has infiltrated and altered the government in many ways. The federal government is making unprecedented amounts of information available to the public. To the extent this transformation has occurred, it is the result of societal and technological changes—in particular, the overwhelming movement of society, and government along with it, online. The law has had very little to do with it. The law lags.

This article will describe and comment on the way in which FOIA has become more peripheral than it once was and than it should be. FOIA's fundamental limitation is its failure to impose affirmative responsibilities on agencies. In particular, (a) it does not require agencies to generate information, and (b) it imposes only minimal (and frequently disregarded) obligations to disseminate information without be-

² World Summit on the Information Society, *Declaration of Principles: Building the Information Society: a global challenge in the new Millennium*, ¶ A.4, Document WSIS-03/GENEVA/DOC/4-E, available at <http://www.itu.int/wsis/docs/geneva/official/dop.html> (last visited Apr. 5, 2009).

³ See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Id.* at 242.

ing asked. In the Information Age, these restrictions are more problematic than ever. A reinvented FOIA might involve agencies that generate, interpret, and disseminate information for the public benefit; the government would be a sort of non-profit publishing house. We are far from such a world, and it would not be an unmitigated blessing. But we should be moving more in that direction.

Reimagining the Freedom of Information Act is far beyond the scope of this brief Article. I will limit myself to consideration of the need for a broader obligation of affirmative disclosures by agencies.

II. GOVERNMENT IN THE INFORMATION AGE

It is worth distinguishing different sorts of information possessed by the government and the agencies within it. Consider the following taxonomy:

1. *Information about the agency and its activities*: What is the agency doing, who is it investigating, what policies is it pursuing, is it abusing its power? This material is at the heart of FOIA as it is generally understood. FOIA is seen as reflecting the need for an informed citizenry to understand and provide oversight of the government that, ultimately, answers to them, and the release of information which furthers government transparency. This category also includes information about agency enforcement activities, such as the agency's interpretations of statutes, enforcement policies, rules for testing on new products, and so on. Thus, this is information that people need and use as *citizens* and as *regulated entities*.

2. *Information about how to interact with the agency*: This is information of value to anyone doing business with or seeking benefits from the agency, such as procedures for applying for government benefits or grants or employment, procurement practices and regulations, and product specifications. The web has made possible an enormous and uncontroversial expansion in the provision of such information. The Bush Administration's 25 E-Government initiatives were primarily focused on facilitating such interaction between the government and its suppliers and "customers;" indeed, the administrations *E-Government Strategy* was subtitled "Simplified Delivery of Services to Citizens."⁴

⁴ See OFFICE OF MGMT. & BUDGET, E-GOVERNMENT TASK FORCE, E-GOVERNMENT STRATEGY: SIMPLIFIED DELIVERY OF SERVICES TO CITIZENS (Feb. 27, 2002), available at http://www.usa.gov/Topics/Includes/Reference/egov_strategy.pdf (last visited Apr. 5, 2009).

3. *Information about the entities regulated by the agency:* This information is compiled by government agencies but is not about the government. It includes such data as compliance records, emissions monitoring, the contents of quarterly and annual reports, and product safety information. Dissemination of such information can be of value for private rather than public goals (for example, to aid competitors) and poses particularly strong issues of confidentiality, privacy, trade secrets, and the like. But recent decades have increasingly seen reliance on the quasi-regulatory effects of disclosing such information.⁵ An important trend in the last decades is increased gathering and public dissemination of such information as a regulatory tool that has impacts on primary conduct. The Toxic Release Inventory ("TRI") is the leading example.⁶ TRI requires firms to report all environmental releases of toxic substances. It imposes no limits on such releases but has been credited with leading to enormous reductions in emissions.⁷ Other examples exist. The Occupational Safety and Health Administration has created web access to its Integrated Management Information System, which had been a purely in-house tool. Now any person with a computer can go online and search by company name to discover which firms have been inspected and what the inspectors found.⁸ The Environmental Protection Agency's Enforcement and Compliance History Online ("ECHO") is a similar resource, allowing users to determine what facilities have been inspected, what violations were found, and what enforcement actions, if any, were taken.⁹ In five years of operation, ECHO has provided data for five million queries.¹⁰

⁵ For a discussion of information disclosure as a tool of environmental protection, see generally E. Donald Elliot, *Environmental TQM: Anatomy of a Pollution Control Program That Works!*, 92 MICH. L. REV. 1840, 1849-151 (1994); Tom Tietenberg, *Disclosure Strategies for Pollution Control*, 11 ENVTL. & RESOURCE ECON. 587 (1998).

⁶ See Emergency Planning and Community Right to Know Act, Pub. L. No. 99-499, § 313, 100 Stat. 1741 (codified at 42 U.S.C. § 11023 (2006)). See generally Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257 (2001). The Toxic Release Inventory "requires facilities that meet minimum size and emission thresholds to report, on standardized forms, their annual releases of listed toxic pollutants . . ." *Id.* at 259. The importance and impact of Toxic Release Inventory were increased exponentially by the development of the World Wide Web.

⁷ Karkkainen, *supra* note 6, at 259-60.

⁸ U.S. Dep't of Labor, *Establishment Search Page*, <http://www.osha.gov/pls/imis/establishment.html> (last visited Jan. 25, 2009).

⁹ U.S. E.P.A., *Enforcement & Compliance Online*, <http://www.epa-echo.gov/echo/> (last visited Jan. 25, 2009).

¹⁰ *Id.*

4. *Information about the world:* This category includes information on the health effects of chemicals, environmental quality, details of particular products (e.g., crashworthiness or gas mileage), and the reams of scientific studies and information that federal agencies collect, as well as other data. Access to such information informs citizens, workers, and consumers, enabling them to participate more effectively in the political, workplace, and economic marketplaces.

FOIA was written with just the first of these four categories in mind. But agency records, especially non-exempt agency records, belong overwhelmingly in the latter categories.¹¹ And increasingly it is understood that dissemination of such information can have salutary effects. In the Information Age, the government is a voracious consumer and generator of information. It should also be a generous conduit and disseminator. And it should—indeed, it can only—do so through the internet.

The federal government's web presence has been transformed in the past decade. However, agency web sites remain "a mixed bag."¹² The overall movement is toward increased proactive disclosure, but it still has a long ways to go. It would be much further advanced than it is but for the September 11th Attacks, which prompted, understandably, a new circumspection about what materials could be made publicly available. A month after the attacks, Attorney General John Ashcroft, more in general mode than attorney mode,¹³ issued a brief but pointed memorandum regarding FOIA. The memorandum, which withdrew a 1993 memo from his predecessor, Janet Reno, emphasized the interests that might conflict with robust disclosure of government records: "safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy." It instructed agencies to withhold any records if there was "a sound legal basis for doing so."¹⁴ This repre-

¹¹ For a brief overview, see Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 339, 341-44 (2004).

¹² National Security Archive, *Mixed Signals, Mixed Results: How President Bush's Executive Order on FOIA Failed to Deliver* 13-16 (Mar. 2008), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB246/index.htm> (last visited Jan. 22, 2009) [hereinafter *Mixed Results*].

¹³ See generally Michael Herz, *Washington, Patton, Schwarzkopf, and . . . Ashcroft?*, 19 CONST. COMM. 663, 675-676 (2003).

¹⁴ Memorandum from John Ashcroft, Attorney General, on the Freedom of Information Act, to Heads of all Federal Agencies and Departments (Oct. 12, 2001), available at <http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm>.

sented a shift from the Clinton Administration policy, which had called for disclosure absent "foreseeable harm."¹⁵ The Bush Administration also took a more expansive view of what documents were exempt from disclosure as classified and withheld records that it considered, controversially, sensitive but unclassified.¹⁶

Notwithstanding this wariness, the Bush Administration has made significant strides in moving government on-line, which is the sine qua non of participation in the Information Age. This movement will only accelerate in the Obama Administration.¹⁷ But this shift occurred, and is occurring, largely outside the purview of FOIA, for reasons the following section explores.

III. FOIA'S LIMITATIONS

FOIA is indisputably powerful open government legislation. Four characteristics stand out.

First, the *right* to know is independent of the *need* to know. Under FOIA, the requestor need not justify the request by establishing a need to know, explaining the purpose for which the document is sought or offering credentials of any sort.¹⁸ Explicitly, "any person"¹⁹ can request an agency record and, implicitly, can do so for any reason or no reason at all. If someone asks for a non-exempt document in the agency's pos-

¹⁵ Memorandum from Janet Reno, Attorney General, on the Freedom of Information Act, to Heads of all Federal Agencies and Departments (Oct. 4, 1993), available at http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm.

¹⁶ On the setback the September 11th Attacks caused to a general trend toward greater openness, see James T. O'Reilly, "Access to Records" Versus "Access to Evil: Should Disclosure Laws Consider Motives as a Barrier to Records Release, 12 KAN. J. L. PUB. POL'Y 559, 568-74 (2003).

¹⁷ On his first day in office, President Obama issued an important memorandum on government transparency. See Memorandum from President Barack Obama, to the Heads of Executive Departments and Agencies, on Transparency and Open Government, 74 Fed. Reg. 4685 (2009). Two months later, Attorney General Eric Holder withdrew the 2001 Ashcroft memorandum, issuing new FOIA Guidelines emphasizing transparency, openness, presumptive disclosure, and timeliness. See Memorandum from Eric Holder, Attorney General, on the Freedom of Information Act, to Heads of Executive Departments and Agencies (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>. The Guidelines are discussed and described by U.S. D.O.J., Office of Information Policy, *President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines: Creating a "New Era of Open Government,"* FOIA POST (Apr. 17, 2009), available at <http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm> (last visited Apr. 24, 2009).

¹⁸ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

¹⁹ 5 U.S.C. § 552(a)(3)(A) (2006) (emphasis added).

session, the agency must provide it, no questions asked.²⁰ This approach was a fundamental shift from the pre-FOIA Administrative Procedure Act, which gave wide discretion to agencies to withhold records if the requester was not "properly and directly concerned" or if the agency determined to keep the records confidential "for good cause found."²¹

Second, at least in theory, the agency cannot stonewall or bury the request. The government custodian of requested records must respond to valid requests within twenty days, either disclosing the record or explaining why it is exempt from disclosure.²² Of course, in the real world, these firm and strikingly short deadlines are routinely exceeded. Delays in handling FOIA requests seem to be an ineradicable feature of the statute's administration.²³ Some efforts have been made in recent years to speed up the process. Executive Order 13,392,²⁴ issued at the end of 2005, required each agency to designate a chief FOIA officer and, among other things, develop a plan to streamline the handling of requests and reduce the backlog of unanswered requests.²⁵ Unfortunately, only modest progress seems to have been made under the order.²⁶ The 2007 OPEN Government Act²⁷ was designed to reduce backlogs and speed responses; the Department of Justice's 2009 FOIA

²⁰ *Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *see also Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989).

²¹ Administrative Procedure Act of 1946, § 3(c), Pub. L. No. 79-404, 60 Stat. 238 (1946) (formerly codified at 5 U.S.C. 1005).

²² 5 U.S.C. § 552(a)(6)(A) (2006). To be precise: the agency must inform the requestor within twenty days of the agency's intention to comply with or deny the request. *Id.* at § 552(a)(6)(A)(i). The requestor may appeal a denial to the agency head, who must decide the appeal within twenty working days. *Id.* In unusual circumstances, the agency may extend either twenty-day limit by ten working days. *Id.* at § 552(a)(6)(B). If the agency anticipates that the extended time period will still be too brief, it must provide the requester the opportunity to either limit the scope of the request or arrange a new or alternative time limit. *Id.* at § 552(a)(6)(B)(ii).

²³ *See, e.g., S. REP. NO. 110-59*, at 3 (2007). "Chief among the problems with FOIA are the major delays encountered by FOIA requestors." *Id.* The only sanction for violating the required time limits is for the requester to treat it as a denial and either appeal or litigate in federal courts. *Spannus v. Dep't of Justice*, 824 F.2d 52, 57-59 (D.C. Cir. 1987).

²⁴ E.O. 13,392, *Improving Agency Disclosure of Information*, 70 Fed. Reg. 75,373 (Dec. 14, 2005).

²⁵ *Id.* at §§ 2(a), 3(b)(ii).

²⁶ *See generally Mixed Results*, *supra* note 12.

²⁷ OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C.A. § 552 (Supp. 2008)).

Guidelines also emphasize times responses.²⁸ The jury is still out on whether these ostensible reforms will in fact reduce the backlog.

Third, FOIA makes all documents presumptively releasable. All records must be released *unless* they fall within one of the nine statutory exemptions.²⁹

Fourth, the denial of a request is subject to judicial review, under standards that favor the requester. The standard of review is a *de novo* rather than arbitrary and capricious standard;³⁰ the burden is on the agency to prove that records are exempt rather than on the requestor to show they are not;³¹ and jurisdiction lies in district court rather than in a court of appeals,³² with full discovery and the opportunity to make a record.

These characteristics combine to make FOIA a truly powerful tool for disclosure of information held by the government, notwithstanding the somewhat fictional nature of the time limits. And yet, despite these characteristics, FOIA falls miles short of being a complete window into the government. A great deal of information is unavailable, in theory or in practice. In part, and most obviously, this is because of the exemptions, the precise scope of which has always been and will always be a matter of dispute. Clearly there must be exemptions; clearly they can be written or read too broadly or too narrowly. But that is not a *structural* characteristic of the particular form FOIA takes. The question of the scope of exemptions is enormously important, but it is outside the scope of this Article.

Two other limitations are inherent in the statute's structure and approach. First, FOIA imposes only minimal *affirmative* duties of disclosure; the basic model is that a record is released only if and when someone requests it. Agencies need not be forthcoming. Second, FOIA imposes no obligation to *generate, compile or interpret* information. The statute applies solely to "records" which exist independently of the stat-

²⁸ See Dep't of Justice, Office of Information Policy, *supra* note 17.

²⁹ This is plain from the basic structure of the Act, which requires agencies to make requested records "promptly available to any person," period, 5 U.S.C. § 552(a)(3)(A) (2006), and then provides that the section "does not apply to matters that" fall within the nine specified exemptions. *Id.* at § 552(b). These exemptions reflect Congress's "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. REP. NO. 89-813, at 3 (1965).

³⁰ 5 U.S.C. § 552(a)(4)(B) (2006).

³¹ 5 U.S.C. § 552(a)(4)(B); Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 755 (1989).

³² 5 U.S.C. § 552(a)(4)(B).

ute. Thus, it creates some disincentive to create records³³ and is only a minimal step toward providing citizens with *knowledge*, as opposed to *information*.

I will focus on the first of these structural limitations. Of course, in 1966, requiring the government to provide records on request was a breakthrough. But requiring the government to provide records *only* on request is a hobbling and increasingly unjustifiable limitation. In David Vladeck's assessment, "[t]his is FOIA's Achilles' heel."³⁴ He explains the following:

The process of drafting and submitting FOIA requests and then waiting for the agency's response is a breeding ground for delay and cynicism over the Act's efficacy. Requesters with time-sensitive needs for information find FOIA's cumbersome request-and-wait-for-a-response approach an often-fatal barrier to the statute's usefulness. The process also invites disputes over whether the requester directed the request to the appropriate governmental entity and described the requested records with adequate specificity, which in turn engender more delay and cynicism.³⁵

Not only is the request-driven approach contentious and time-consuming, it is inherently limited by the fact that the requester, by definition, does not know what the agency has and, therefore, does not know what to ask for. Some requests will be unfounded and inappropriately broad. Others will be self-defeatingly narrow, failing to say the magic words to obtain a non-exempt, valuable record that the requester just did not know how to ask for.³⁶

³³ The Federal Records Act does at least prevent, at least in theory, the destruction of agency records except as authorized by the Archivist of the United States. See 44 U.S.C. §§ 3303, 3303(a) (2006).

³⁴ David C. Vladeck, *Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1789 (2008).

³⁵ *Id.*

³⁶ This is sometimes referred to as "the requester's paradox." See, e.g., Statement of Ari Schwartz, Center for Democracy & Technology, before the House Government Reform Subcommittee on Government Management, Finance, and Accountability on the Freedom of Information Act, at 2 (May 11, 2005) ("[T]he 'requester's paradox' — 'how can I know to request a specific document, when I don't even know that the document exists?'").

IV. INCREMENTAL SHIFTS UNDER FOIA AWAY FROM THE REQUEST-DRIVEN PROCESS

To be fair, FOIA is not *entirely* request-driven. This section lays out the ways in which the current statute imposes some affirmative duties of disclosure.

A. Reading Rooms

From the outset, FOIA required that certain items be either published in the *Federal Register* or "made available for public inspection and copying."³⁷ Items in the first category, now known as "(a)(1) material," after the relevant section of the amended statute, include descriptions of agency organization, rules of procedure, and proposed and final regulations.³⁸ The second category, "(a)(2) material," originally consisted of final opinions and orders in agency adjudications, statements of policy and interpretive rules that were not published in the *Federal Register*, and administrative staff manuals.³⁹ Hard copies of these were to be maintained in "reading rooms" (a term that does not appear in the statute) open to the public.⁴⁰ Thus, some material must actually be published and some made generally available, even absent a request for it. These are requirements of affirmative disclosure. But they have two fundamental limitations. First, the meaningfulness of the disclosure is limited by the mechanism of disclosure. For most citizens, these materials remained largely unavailable, since accessing them required both some sophistication and a trip to Washington. Second, these provisions do not require affirmative disclosure of government *information*. Rather, they provide for disclosure of *law*. The idea, frequently stated, was to avoid the existence of "secret law." As the Supreme Court has explained, "The affirmative portion of the Act . . . represents a strong congressional aversion to 'secret [agency] law,' and represents an affirmative congressional purpose to require disclosure of documents which

³⁷ 5 U.S.C. § 552(a)(2) (2006).

³⁸ 5 U.S.C. § 552(a)(1) (2006) (requiring each agency to publish in the Federal Register descriptions of the agency, statements of its general policies, rules of procedure, and substantive rules and statements of general policy of general applicability). This provision was section 3(a) of the 1966 Act.

³⁹ *Id.* at §§ 552(a)(2)(A), (B), and (C) (requiring each agency to make available for inspection and copying final opinions in agency adjudications, statements of policy and interpretations that were not published in the Federal Register, and staff manuals). This provision was section 3(b) of the 1966 Act.

⁴⁰ *Id.*

have the force and effect of law.”⁴¹ The idea has roots in the Due Process Clause and in the fundamental jurisprudential principle that for “law” to merit the name, it must be knowable and known by those to whom it applies.⁴²

In short, for its first thirty years, FOIA imposed no meaningful obligation of affirmative disclosure of government information.

B. *Electronic Reading Rooms*

This changed in 1996. The significance of the reading room idea, and thus the importance of the distinction between (a)(1) material and (a)(2) material, on the one hand, and (a)(3) material (all other agency records, which can be obtained only upon request), on the other, became enormously more important with the development of the internet. Once the reading room can be electronic, then material found therein is truly publicly available. Congress was a little late to this realization, but in the 1996 Electronic Freedom of Information Act Amendments, (“EFOIA”) it significantly expanded the reading room concept. First, it required agencies to provide electronic access to all (a)(2) material created after November 1, 1996. That is, every agency must maintain a website to which it posts all post-1996 records that FOIA requires to be made available in a reading room. Simultaneously, Congress dramatically expanded the scope of § 552(a)(2); it now also includes,

all records, regardless of form or format, which have been released to any person [who made a specific request therefore] and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.⁴³

In other words, anything that has been or is likely to be requested three times—the initial request plus subsequent “requests” (plural)—must “be made available for inspection and copying,” i.e., go into the reading

⁴¹ NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (quoting Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 797 (1967), and H.R. REP. NO. 89-1497, at 7 (1966)); see also Frank Easterbrook, *Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act*, 9 J. LEGAL STUD. 775, 777 (1980) (stating the purpose of FOIA is to eliminate “secret law”).

⁴² See, e.g., LON FULLER, *THE MORALITY OF LAW* 38-39 (rev. ed. 1969) (describing eight “routes to disaster” that “result in something that is not properly called a legal system at all,” all of which involve ways in which it proves impossible to know or comply with the law).

⁴³ 5 U.S.C. § 552(a)(2)(D) (2006).

room.⁴⁴ And again, any material created after November 1996 that must be made available for inspection and copying must be made available electronically.

Thus, the idea of EFOIA is to put online anything of sufficient general interest that three people want to see it enough to ask for it. By the express terms of the statute, it is not necessary that three people have already asked; it suffices that the document has been requested *once* and two other requests "are likely." As one observer has written, the basic thrust of EFOIA was to shift from a system in which requesters endure lengthy delays while waiting for paper copies of records "to a model in which agencies anticipate requests and act to make records (and information on how to find additional records) available over online systems."⁴⁵

EFOIA has not wholly lived up to its promise. Although practices vary, not surprisingly, from agency to agency, in general agencies have placed only a fraction of the material that should be available in their reading rooms. Consider one specific example. As Michael Gerrard and I have written elsewhere,⁴⁶ every Environmental Impact Statement ("EIS") prepared since 1996 should be available in the relevant agency's electronic reading room. The National Environmental Policy Act ("NEPA") requires federal agencies to prepare an EIS before undertaking actions that may have a significant effect on environmental quality.⁴⁷ Historically, these have been multi-volume, hard copy documents—difficult to locate, transport, or search. Agencies are increasingly posting both draft and final EIS's, along with background documents, online, but the shift has been inexcusably (and illegally) slow. The FOIA argument is straightforward. EIS's and related environmental documents are agency "records;" NEPA itself makes them so,

⁴⁴ *Id.*

⁴⁵ Michael Tankersley, *Opening Drawers: A Requester's Guide to the Electronic Freedom of Information Act Amendments*, LEGAL TIMES, May 19, 1997, at 29. See also generally Michael E. Tankersley, *How the Electronic Freedom of Information Act Amendments of 1996 Update Public Access for the Information Age*, 50 ADMIN. L.J. 421 (1998).

⁴⁶ Michael Gerrard & Michael Herz, *Harnessing Information Technology to Improve the Environmental Impact Review Process*, 12 N.Y.U. ENVTL. L.J. 18 (2003).

⁴⁷ 42 U.S.C. § 4332(2)(C) (2006). This "detailed statement" must address "the environmental impact of the proposed action," any unavoidable adverse environmental impacts, "alternatives to the proposed action," the "relationship between local short-term uses of [the] environment and the maintenance and enhancement of long-term productivity," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." *Id.*

requiring that an EIS "shall be made available to . . . the public as provided by" FOIA.⁴⁸ Prior to 1996, they would have been "(a)(3) material." Thus, FOIA imposed no affirmative duty on the agency to provide or disseminate EIS's unless and until it received a request for them. But EIS's easily fall within the frequently requested records provision of the 1996 Amendments. Any EIS that has been, or can be expected to be, asked for by three or more people must be posted to the web. It would be the rare EIS that would not be the subject of three requests. Yet one simply does not find many EIS's in agency reading rooms,⁴⁹ and the gap is hardly limited to EIS's.

President Bush's 2005 FOIA Executive Order 13,392, nods toward this problem without really grappling with it. The order requires each agency to designate a senior agency official as Chief FOIA Officer.⁵⁰ Among this officer's duties is an overall review of the agency's FOIA operations, including, "review [of] the agency's policies and practices relating to the availability of public information through websites and other means, including the use of websites to make available the records described in section 552(a)(2) of title 5, United States Code."⁵¹ On the basis of this review, each agency was to develop a plan for 2006 and 2007 that, among other things,

include[d] specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including . . . increased reliance on the dissemination of records that can be made available to

⁴⁸ *Id.*

⁴⁹ This does not mean that the EIS's are not available somewhere on the agency's website. For example, the Department of the Interior, which produces many EIS's, has in recent years done a good job of getting them on-line. *See, e.g.*, Geothermal Resources Leasing Programmatic EIS (Dec. 2008), *available at* http://www.blm.gov/wo/st/en/prog/energy/geothermal/geothermal_nationwide.html. But it does not place them in or link to them from its electronic reading room. *See* U.S. Dept. of the Interior, FOIA Electronic Reading Room, <http://www.doi.gov/foia/readroom.html>.

⁵⁰ Exec. Order No. 13,392, § 2(a), 70 Fed. Reg. 75,373 (2005). In 2007, Congress wrote this requirement into the statute itself. *See* OPEN Government Act § 10, 5 U.S.C.A. §§ 552(j), (k), (l) (Supp. 2008). The new law directs agencies to designate a Chief FOIA Officer and one or more FOIA Public Liaisons. The Chief FOIA Officer has "agency-wide responsibility for efficient and appropriate compliance" with FOIA and is required to "monitor implementation" of FOIA and recommend to the agency head "such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation." The Chief FOIA Officers report to the Attorney General through the head of the agency. The Attorney General can require the Chief FOIA Officers to submit reports on their agency's performance "at such times and in such formats" as he establishes. *Id.*

⁵¹ Exec. Order No. 13,392, § 3(a)(iv), 70 Fed. Reg. 75,373, at § 3(a)(iv) (2005).

the public through a website or other means that do not require the public to make a request for the records under the FOIA.⁵²

Thus, the order nudges agencies toward full satisfaction of the (a)(2) requirements and suggests going beyond the statutory minima by putting records on-line that do not (yet) constitute (a)(2) material, in anticipation of their being requested.⁵³

In the three years since E.O. 13,302 was issued, it appears that many agencies have increased the amount of material that is affirmatively disclosed. According to a May 2008 Department of Justice summary of the reports it had received from individual agencies, there has been progress.⁵⁴ Yet despite the sunny, self-serving reports of the agencies, most still seem to be falling short. The general failure was described in a December 2007 report from the National Security Archive at George Washington University entitled *File Not Found*.⁵⁵ According to the study, only twenty-one percent of federal agencies had electronic reading rooms that contained all four types of materials required: opinions and orders, statements of policy, agency manuals, and frequently requested records.⁵⁶ Interestingly, the first three items, which have been required to be made available (though not electronically) from the beginning, were missing more often than the fourth. Fifty-nine percent of agencies included frequently requested records in their electronic reading rooms.⁵⁷

Of course, the fact that *some* such records are available in electronic reading rooms does not mean that everything that is supposed to be there in fact is. The fifty-nine percent figure should not be reassuring. It means that forty-one percent of agencies have *not* posted a single document in this category; it is simply impossible to believe that these agencies have never had a FOIA request for a document that was, or is likely to be, requested two more times. And it is a moral certainty that at least

⁵² *Id.* at ¶ 3(b)(ii).

⁵³ *Id.* at §§ 3(a)(iv), (b)(ii).

⁵⁴ See ATTORNEY GENERAL'S REPORT TO THE PRESIDENT PURSUANT TO EXECUTIVE ORDER 13,392, ¶¶ II(2), (3) (2008), available at <http://www.usdoj.gov/oip/ag-rpt08/ag-report-to-president06012008.htm>.

⁵⁵ NATIONAL SECURITY ARCHIVE, FILE NOT FOUND: 10 YEARS AFTER E-FOIA, MOST FEDERAL AGENCIES ARE DELINQUENT (2007), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/err.htm> (last visited Apr. 24, 2009).

⁵⁶ *Id.* at 7.

⁵⁷ *Id.* at 8-9.

some of the fifty-nine percent who have put some frequently requested records in their electronic reading rooms are underposting.⁵⁸

In summary, the electronic reading room created by EFOIA does not fundamentally shift the statute from the request-driven model. A record must be posted only if it has been requested (and is likely to be requested at least two more times). As DOJ has explained: "Fundamentally, this reading room provision does not even come into play until an agency processes and discloses records under the Act in the first place."⁵⁹ For an agency to post a record in anticipation of future requests "would be so premature, at least in relation to subsection (a)(2)(D), that it would amount to according 'reading room' treatment to records on an entirely gratuitous, or discretionary, basis."⁶⁰ Moreover, Congress' most recent amendments, the 2007 OPEN Government Act,⁶¹ do nothing to increase affirmative disclosure of agency records. That legislation focuses on the delay issue. While it does write some of E.O. 13,392 into the U.S. Code, it is silent with regard to any duties of affirmative disclosure or electronic reading rooms. Finally, agency compliance with the disclosure obligations of 552(a)(2) has been spotty.

V. OTHER LEGISLATION

Other legal requirements endorse useful and transparent agency websites, and promote the movement of information online, but fall short of creating affirmative disclosure requirements for agencies.

⁵⁸ As the report states:

At certain large or decentralized agencies, there is very poor compliance with affirmative posting obligations. Even though it is difficult for members of the public to assess whether agencies are posting frequently requested records, it seems unlikely that large departments receiving tens of thousands of FOIA requests each year do not receive multiple requests for at least some documents, particularly those that relate to current events or major policies or actions of the agency. In some cases, it was apparent that only one or two components contributed frequently requested records to agency electronic reading rooms or only a few components maintained their own electronic reading rooms. Such lack of consistency and oversight across a large agency suggests that some E-FOIA required documents fall through the cracks and are never made available to the public.

Id. at 9 (footnote omitted).

⁵⁹ U.S. Dep't of Justice, *FOIA Counselor Q&A: "Frequently Requested" Records*, FOIA POST, (July 25, 2003), available at <http://www.usdoj.gov/oip/foiapost/2003foiapost28.htm>.

⁶⁰ *Id.*

⁶¹ See *supra* note 22.

A. *The Paperwork Reduction Act*

The Paperwork Reduction Act ("PRA")⁶² is primarily concerned with minimizing the paperwork burden on regulated entities and with ensuring oversight of agency information requests through the Office of Management and Budget ("OMB"). However, the Act also contains some general provisions concerning the management and dissemination of information.⁶³ One of Congress' purposes in enacting the PRA was to "provide for the dissemination of public information on a timely basis, on equitable terms, and in a manner that promotes the utility of the information to the public and makes effective use of information technology."⁶⁴ In particular, the 1995 Amendments to the PRA require every agency to "ensure that the public has timely and equitable access to the agency's public information."⁶⁵ Such access is to be ensured by, among other things, "dissemination . . . in an efficient, effective, and economical manner."⁶⁶ Given the state of current technology, in most instances posting to a website is the most "efficient, effective, and economical manner" in which to disseminate information and, therefore, is required by the PRA.

So far so good. However, the PRA does *not* in fact require anything to be released to the public. The agency decides *what* to release, and then the PRA kicks in with regard to *how* that release must occur. "Public information" is defined as "any information, regardless of form or format, that an agency discloses, disseminates, or makes available to the public."⁶⁷ One might argue that if any agency responds to a FOIA request, it has made information "available to the public," so any document released under FOIA is "public information" for purposes of the PRA. However, that argument puts more weight on "public" than the term can bear; release to *a member of* the public is not the same as

⁶² Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (2006).

⁶³ See generally *id.* at § 3506.

⁶⁴ *Id.* at § 3501(7).

⁶⁵ Paperwork Reduction Act of 1995, Pub. L. No. 104-13, sec. 2, § 3506(d)(1), 109 Stat. 171, 174-75 (codified at 44 U.S.C. § 3506(d)(1) (2006)). "Agency" is defined broadly to include "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." *Id.* at § 3502(1).

⁶⁶ *Id.* at § 3506(d)(1)(C). One might have hoped that agencies did not require a legal mandate to operate in an efficient, effective, and economical manner. In any event, they have such a mandate.

⁶⁷ See 44 U.S.C. § 3502(12) (2006).

release to the public at large. And in any event, such a reading still applies only to something that has been requested, if only once. In short, the PRA does not impose any affirmative duty of disclosure. It does, as a practical matter, require that agencies post what information they do release to a website, but the threshold determination regarding what to release lies with the agency and/or rules stemming from other statutes.

B. OMB

The OMB, which is charged with implementation of the PRA,⁶⁸ has endorsed dissemination of agency information in electronic form. OMB Circular A-130, first issued in 1985⁶⁹ and revised several times since, "contains the most comprehensive statement of executive branch information policy."⁷⁰ Adopted under the authority of the PRA, among other statutes, the Circular applies to all federal agencies. The Circular provides the following:

(8) Electronic Information Dissemination. Agencies shall use electronic media and formats, including public networks, as appropriate and within budgetary constraints, in order to make government information more easily accessible and useful to the public. The use of electronic media and formats for information dissemination is appropriate under the following conditions:

- (a) The agency develops and maintains the information electronically;
- (b) Electronic media or formats are practical and cost effective ways to provide public access to a large, highly detailed volume of information;
- (c) The agency disseminates the product frequently;
- (d) The agency knows a substantial portion of users have ready access to the necessary information technology and training to use electronic information dissemination products;

⁶⁸ Indeed, the Office of Information and Regulatory Affairs, charged with overseeing the implementation, was created by this legislation. See Paperwork Reduction Act of 1980, Pub. L. No. 96-511, sec. 2(a), § 3503(a), 94 Stat. 2814 (codified as amended at 44 U.S.C. § 3503 (2006)).

⁶⁹ Management of Federal Information Resources, 50 Fed. Reg. 52,730 (Dec. 24, 1985) (issuing OMB Circular A-130).

⁷⁰ Henry H. Perritt, Jr., *Electronic Freedom of Information*, 50 ADMIN. L. REV. 391, 400 (1998).

- (e) A change to electronic dissemination, as the sole means of disseminating the product, will not impose substantial acquisition or training costs on users, especially State and local governments and small business entities.⁷¹

More recently, spurred in part by the E-Government Act, which is discussed in detail *infra*, OMB has continued to press agencies to have electronic retrieval sources of increasing sophistication, searchability, and ease of use.⁷²

Like the PRA itself, OMB's Circular and memoranda strongly endorse posting materials to the web *if* the agency is otherwise distributing them. But they do not contain an affirmative requirement to distribute anything at all.

C. *The E-Government Act*

One would expect that if there was one important piece of legislation moving the government online, it would be the E-Government Act, signed into law in December 2002.⁷³ The Act's goals and rhetoric are lofty, but its actual requirements are modest. Two provisions cover agency websites. Section 206(b) provides:

To the extent practicable as determined by the agency in consultation with the Director, each agency (as defined under section 551 of title 5, United States Code) shall ensure that a publicly accessible Federal Government website includes all information about that agency required to be published in the Federal Register under paragraphs (1) and (2) of section 552(a) of title 5, United States Code.⁷⁴

This sounds good, but really does nothing, for four reasons. First, it is limited by the introductory escape clause; the agency need only do any of this "to the extent [it deems] practicable." Second, the provision contains a major drafting glitch. It requires posting of information that

⁷¹ Management of Federal Information Resources, 58 Fed. Reg. 36,068, 36,073 (July 2, 1993) (revising Circular A-130); OMB Circular A-130 at § 8.a.8.

⁷² See, e.g., Memorandum from Clay Johnson, Deputy Director for Management, OMB, to Heads of Executive Departments and Agencies, Improving Public Access to and Dissemination of Government Information and Using the Federal Enterprise Architecture Data Reference Model (Dec. 16, 2005).

⁷³ E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified in scattered sections of 44 U.S.C.).

⁷⁴ 44 U.S.C. § 3501(note) (2006).

section 552(a)(2) requires be published in the *Federal Register*, but section 552(a)(2) does not require *any* information to be published in the *Federal Register*. Section 552(a)(1) identifies various items that must be published in the *Federal Register*; subsection (a)(2), in contrast, only requires that the agency "make available for public inspection and copying" certain other records. Read literally, the Act's reference to subsection (a)(2) is gibberish: The "information about that agency required to be published in the Federal Register under paragraph . . . (2) of section 552(a)" is the null set. Third, if the provision is read as requiring website posting of (a)(2) material, it merely duplicates what EFOIA already requires. Fourth, it does not apply to all (a)(2) information but only to "information about the agency." Thus, section 206 proves meaningless as a legal requirement of affirmative disclosure.

Section 207 of the E-Government Act also promises more than it delivers. That section expressly requires that agencies have websites that include:

- (i) descriptions of the mission and statutory authority of the agency;
- (ii) information made available to the public under subsections (a)(1) and (b) of section 552 of title 5, United States Code . . . ;
- (iii) information about the organizational structure of the agency; and
- (iv) the strategic plan of the agency.⁷⁵

Like Section 206, this provision is essentially meaningless. Again, it requires posting of information that would seem to already be required to be included in the electronic reading room. And it too has its own drafting gaffe, referring to "information made available to the public" under 552(b). But section 552(b) contains the exceptions to FOIA's disclosure requirements. Presumably, this is a scrivener's error; the reference should have been to "subsections (a)(1) and (2) of section 552."⁷⁶

In short, the E-Government Act is a classic example of Congress passing symbolic legislation and leading from behind, imposing a toothless mandate on agencies to do what they are already doing. Indeed, the very fact that these provisions have produced no decided cases and virtually no discussion of their drafting gibberish indicates how inconsequential they have been. Prompted by constituent demands, technological

⁷⁵ E-Government Act, Pub. L. No. 107-347, 116 Stat. 2899, at § 207(f)(1)(A) (codified at 44 U.S.C. § 3401(note) (2006)).

⁷⁶ Gerrard & Herz, *supra* note 46, at 47.

changes, prodding from the White House and OMB, and their own professionalism, agencies have made very significant gains in affirmative disclosures. But not because they have had to and not to the extent they could and should.

VI. CONCLUSION: ABANDONING THE REQUEST-DRIVEN MODEL

FOIA's request-driven model has never been more of an anachronism. The 1996 EFOIA Amendments reflected this fact and took a step toward meaningful affirmative disclosures even absent particular requests. It should go without saying that agencies should fully comply with these requirements; not all presently do. But the 1996 Amendments remain fundamentally tied to the need for a request. Other legislation promises more transparency but fails in fact to impose additional requirements for affirmative disclosure.

As technology develops, and the society-wide shift towards "freedom of information" in the non-statutory, more abstract sense continues, agencies have increasingly placed information on their websites. But they have not yet taken the bold but no longer unthinkable step: simply place all non-exempt records on the web.⁷⁷ Nothing is stopping them.

FOIA sets a minimum; subject to external legal constraints, such as the Privacy Act,⁷⁸ the Information Quality Act,⁷⁹ and trade secret pro-

⁷⁷ A recent task force report recommends that agencies do exactly this. See CARY COGLIANESE, HEATHER KILMARTIN, & EVAN MENDELSON, *TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS: A NONPARTISAN PRESIDENTIAL TRANSITION TASK FORCE REPORT 9-11*, available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1252&context=upenn/wps> (last visited Apr. 24, 2009). "Agencies should streamline the FOIA request process by publishing electronically . . . any documents that an agency or court has previously determined not to fall with a FOIA exemption." *Id.*

⁷⁸ Designed to protect individual privacy, The Privacy Act, enacted in 1974 and codified at 5 U.S.C. § 552a, restricts agencies' ability to release,

information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

5 U.S.C. § 552a(a)(4) (2006).

⁷⁹ The Information Quality Act, found in the General Appropriations Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2765, has just two provisions, codified at 44 U.S.C. § 3516 note. First, § 515(a) requires OMB to issue guidelines under the Paperwork Reduction Act "that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." Second, § 515(b) requires each agency to (a) issue its own

tections, agencies are free to make public documents that FOIA does not require them to release or post. As early as 1993, three years before passage of EFOIA, President Clinton had circulated a memo stating: "Each agency has a responsibility to distribute information on its own initiative, and to enhance public access through the use of electronic information systems."⁸⁰ And as noted, President Bush's E.O. 13,392 nudges agencies towards broader online posting of material that has not in fact been requested and is not required to be placed in the electronic reading room by section 552(a)(2).

DOJ uses the term "affirmative disclosure" to refer to posting records as required by 552(a)(2) and the term "proactive disclosure" to refer to posting material without any legal obligation to do so.⁸¹ Posting material that may be, though has not yet been, the subject of FOIA requests can reduce the need for such requests.⁸² So proactive posting is one way of ameliorating the perennial and intractable problem of delay in answering requests. But that is a rather unambitious understanding of what proactive disclosure might consist of. It is undeniably a step beyond the current statute, for it does not require an actual request to trigger dissemination. But it is still keyed to the question of what citizens might ask for rather than what citizens might find useful. Because requestors generally, and by definition, do not know what the agency has, the requestor-based system will always be incomplete.

guidelines consistent with OMB's guidelines, which also ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by the agency; (b) establish an administrative mechanism allowing affected persons to obtain corrections of information maintained and disseminated by the agency that does not comply with the guidelines; and (c) file an annual report with OMB regarding complaints received about the accuracy of information disseminated by the agency. Though innocuous looking, the Act likely creates, and was intended to create, some disincentives to public dissemination of information possessed by the agency. For a critical assessment that stresses this feature, see THOMAS O. MCGARITY ET AL., CENTER FOR PROGRESSIVE REGULATION, TRUTH AND SCIENCE BETRAYED: THE CASE AGAINST THE INFORMATION QUALITY ACT (2005).

⁸⁰ Memorandum from President William J. Clinton, to the Heads of Departments and Agencies, on The Freedom of Information Act (Oct. 4, 1993).

⁸¹ See U.S. D.O.J., Office of Information & Privacy, *Executive Order 13,392 Implementation Guidance*, FOIA POST, available at <http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm>.

⁸² *Id.*; see also Exec. Order No. 13,392 § 3(b)(ii). This executive order states the following: The plan shall include specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including . . . increased reliance on the dissemination of records that can be made available to the public through a website or other means that do not require the public to make a request for the records under the FOIA.

Id.

Given its history, it seems unlikely that Congress will get out ahead on this issue and require agencies to do so. But at the start of the Obama Administration, which has shown both a greater ostensible commitment to transparency, and certainly greater sophistication about the internet, than any of its predecessors, the moment may be ripe for a voluntary or newly mandated effort to genuine freedom of information. On his first full day in office, the new president issued two memoranda that augur such a future. In a memorandum on transparency and open government, the president declared the following:

Government should be transparent. Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use. Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.⁸³

And in a memorandum focused on FOIA specifically, he announced "a new era of open government" and a "presumption of disclosure, under which "agencies should take affirmative steps to make information public. They should not wait for specific requests from the public."⁸⁴ In pursuance of this directive, Attorney General Holder's FOIA memorandum expressly states that "agencies should readily and systematically post information online in advance of any public request."⁸⁵

It is too early to tell whether this early commitment and enthusiasm will persist and flourish through the months and years of actual governing. But we should hope they will.

⁸³ Memorandum on Transparency and Open Government, *supra* note 17.

⁸⁴ Memorandum from President Barak Obama, to the Heads of Executive Departments and Agencies, on the Freedom of Information Act, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009).

⁸⁵ Holder Memorandum, *supra* note 17, at 3.